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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL ANTHONY RAMOS,

Defendant and Appellant.

F069816

(Super. Ct. No. F13909810)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Peter Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Manuel Anthony Ramos was charged with first degree burglary (Pen. Code,<sup>1</sup> § 459, 460; count 1), corporal injury to a spouse or cohabitant (§ 273.5, subd. (a); count 2), battery causing serious bodily injury (§ 243, subd. (d); count 3), and assault with force likely to cause great bodily injury (§ 245, subd. (a)(4); count 4). An enhancement alleged defendant caused great bodily injury in the commission of each count.

A jury convicted defendant of first degree burglary, misdemeanor battery on a cohabitant, a lesser included offense of count 2, battery causing serious bodily injury, and misdemeanor assault, a lesser included offense of count 4. In addition, the jury found true the enhancement alleging defendant personally inflicted great bodily injury as to counts 1 and 3. In a bifurcated bench trial, the court found defendant had suffered 16 prior strike convictions (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), he had served two prior prison terms (§ 667.5, subd. (b)), and he suffered three prior serious felony convictions (§ 667, subd. (a)(1)). Defendant was sentenced to an aggregate determinate term of 15 years and an indeterminate term of 25 years to life.

Defendant raises the following claims on appeal: (1) trial counsel rendered ineffective assistance of counsel for failing to cross-examine a witness at trial about the witness's probationary status; (2) trial counsel rendered ineffective assistance by inadvertently referring to defendant's prior convictions as "commercial burglaries" rather than "theft-related offenses"; (3) insufficient evidence supports defendant's conviction for battery causing serious bodily injury on count 3; (4) insufficient evidence supports defendant's conviction for burglary; (5) the jury's not guilty verdicts on the felonies alleged in counts 2 and 4 require defendant's burglary conviction to be vacated; (6) the trial court erred by failing to adequately instruct the jury on burglary by not defining

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<sup>1</sup>All statutory citations are to the Penal Code unless otherwise indicated.

“felony” sua sponte and by failing to explain burglary requires the intent to commit a felony rather than a misdemeanor offense. We disagree and affirm.

## **PROCEDURAL AND FACTUAL HISTORY**

### ***Prosecution’s Case***

In 2011 or 2012, defendant and Rita Ortega met and entered into a dating relationship. The couple lived together for a short period of time, but by May 2013, they were living apart. Defendant and Ortega dated off and on for a while until they ended their relationship indefinitely in June 2013.

On August 13, 2013, Ortega was staying with her friend, Edward Moreno, because the electricity to her house had been turned off. Ortega was in the process of having her electricity restored, and Moreno went with her to the home to make a few repairs.

At around 6:30 or 7:00 p.m., Ortega began making a pasta dinner on a propane stove. Moreno went to retrieve some tools from his vehicle when he saw a vehicle with four males drive up to the residence. Defendant got out of the vehicle, ran inside Ortega’s home, and asked her who Moreno was. When Ortega responded, ““That’s Edward,”” defendant became upset and stated, ““I’m going to go after him.”” Defendant picked up a kitchen paring knife. Ortega pleaded with defendant to put the knife down. Defendant went to the front door with the knife, but he turned around and came back to where Ortega was standing.

Defendant asked Ortega, ““Do you know I love you?”” When Ortega did not respond, defendant slapped her twice in the face and ran out the back door. Ortega went to the front door to see where defendant went and to lock the door. Defendant began to run to the back door. Ortega tried to beat him to the back door to lock it as well, but as she rushed to the back door, she slipped, fell, and spilled the pasta she was cooking on the floor.

Defendant came inside the home and began hitting Ortega with his fists. While she was on the ground, defendant punched her in the face three times and kicked her.

Defendant's blows fractured Ortega's nasal bone, leaving her nose crooked and bleeding. Ortega screamed for defendant to stop. Defendant fled through the back door.

Cathy Delgado, a neighbor of Ortega's, saw a man whom she identified as defendant, leave the rear of Ortega's property. Delgado dialed 911 at Ortega's request. Ortega was taken to the hospital for treatment of her injuries.

At trial, Moreno identified defendant as the man he observed enter Ortega's home. Moreno left when he heard Ortega and defendant yelling at each other so he did not witness the incident.

### ***Defense's Case***

Defendant agreed he and Ortega dated and lived together in 2011, but stated he had moved out of the couple's home in July 2012. He claimed he was still in a dating relationship with Ortega on August 13, 2013, although he stated the relationship was off and on.

Defendant testified he saw Ortega several times earlier that day at his work, and he and Ortega had made plans to see each other that evening. Defendant arrived at Ortega's home at 7:45 p.m., just in time to see Moreno leaving. Defendant asked Ortega who Moreno was, and Ortega replied it was none of defendant's business. Defendant agreed because he and Ortega were no longer together.

Defendant told Ortega he had to go back to work, but Ortega became angry and complained she had made a meal but defendant would not be there to eat it. Defendant claimed Ortega threw hot pasta sauce at him in anger. The sauce burned him and got on his clothes.

Defendant grabbed for the utensil Ortega was holding, causing her to slip and fall backward. Ortega asked for help getting up and defendant swore at her and left. Defendant denied being jealous of Moreno. He also denied hitting Ortega or entering her home with the intent to strike her.

## ***Rebuttal***

Officer Todd Turney testified he interviewed defendant on October 12, 2013. Defendant told Turney he had gone over to Ortega's home to "hang out" with her. When Ortega told defendant that Moreno was none of his business, he got upset and began to yell. Defendant told Turney Ortega threw the pot of sauce at him. He claimed he was trying to pull his shirt away from his body to keep the sauce from burning him when he accidentally pushed Ortega, causing her to fall.

## **ANALYSIS**

### **I. Trial Counsel Did Not Render Ineffective Assistance of Counsel by Failing to Impeach Delgado with the Fact She Was on Probation**

Defendant claims trial counsel rendered ineffective assistance of counsel for failing to impeach Delgado with her probationary status. The People contend counsel's performance did not fall below an objective standard of reasonableness because Delgado's probationary status was inadmissible. They further contend even if trial counsel erred, defendant has failed to show prejudice. We agree with the People and conclude defendant's claim lacks merit.

#### **A. Background**

Prior to trial, the parties discussed whether Delgado could be impeached with the fact she was on probation. Trial counsel advised the court that whether a witness's probationary status was admissible depends on whether the witness has bias or had a motive to testify in a certain way as a result of that witness's status. The trial court agreed that whether a witness may be impeached with his or her probationary status depends on whether the witness has an incentive to testify in a certain way so as not to incur a violation of probation. Because Delgado was not facing any probation violation, trial counsel explained there was no basis to infer Delgado had a motive to testify in any particular manner. Thus, trial counsel declined to impeach Delgado with the fact she was on probation.

At trial, Delgado testified she heard Ortega yelling, and when she asked Ortega if she needed help, Ortega asked Delgado to call the police. Delgado dialed 911 for Ortega. Delgado testified defendant was present at the time of the incident, but she could not remember many of the details surrounding the incident. While Delgado testified Ortega was injured and bleeding from her nose, she could not recall whether Ortega stated her ex-boyfriend had hit her.

In his testimony, defendant acknowledged he was present at Ortega's home, and he claimed Ortega had been injured as a result of an accident. Trial counsel argued Delgado was not a witness to the physical altercation because she had arrived only after the accident occurred, and her testimony was not helpful to the jury because of her inability to recall key details about the incident.

## **B. Discussion**

A defendant claiming ineffective assistance of counsel in violation of his or her Sixth Amendment right to counsel must show defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that it is reasonably probable, but for counsel's failings, the outcome at trial would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 (*Strickland*)). The burden rests with the defendant to show inadequate or ineffective representation, and the proof "must be a demonstrable reality and not a speculative matter." (*People v. Karis* (1988) 46 Cal.3d 612, 656.)

On appeal, we look to the record to see if there is any explanation for the challenged aspects of representation. If the reasons for trial counsel's actions are not readily apparent from the record, we will not assume constitutionally inadequate representation and reverse a conviction unless the record discloses "no conceivable tactical purpose" for counsel's act or omission." (*People v. Lewis* (2001) 25 Cal.4th 610, 674–675; accord, *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.)

In the instant case, defendant does not challenge the trial court's finding that Delgado's prior conviction was not a crime of moral turpitude. Rather, defendant argues trial counsel was incompetent for failing to impeach Delgado with the fact she was on probation as a result of her prior conviction.

In *People v. Harris* (1989) 47 Cal.3d 1047, 1091, our Supreme Court rejected the defendant's contention that evidence a witness for the prosecution was on probation for a misdemeanor offense, and was in custody for another offense at the time of trial, should have been admitted because the witness's status supplied him with a motive for testifying in favor of the prosecution. The court distinguished the case before it from *Davis v. Alaska* (1974) 415 U.S. 308, where the United States Supreme Court held the trial court's refusal to allow the defendant to cross-examine a key witness for the prosecution as to the witness's probationary status denied the defendant his right to confrontation. In *Davis*, the defendant did not have the opportunity to make an offer of proof as to the witness's potential bias or motive because a hearing pursuant to Evidence Code section 402 did not occur.

In contrast, the defendant in *Harris* failed to make an offer of proof at the Evidence Code section 402 hearing showing the witness had been offered immunity or a reward in the pending case in exchange for his testimony, or that the witness had been offered any benefits related to his probationary status. (*People v. Harris, supra*, 47 Cal.3d at p. 1090.) As a result, the *Harris* court concluded, "In the absence of any offer of proof by defendant that [the witness] had been threatened with probation violation, or other sanctions, or had been offered incentives for his testimony, the trial court did not abuse its discretion in sustaining the objection." (*Id.* at p. 1091.) The court made clear the confrontation clause guarantees the opportunity to cross-examine a witness, ""not cross-examination that is effective in whatever way, and to whatever extent the defense might wish."" (*Ibid.*)

Here, trial counsel declined to impeach Delgado with the fact she was on probation, not because he misunderstood the law, as defendant asserts, but because there was no evidence Delgado's testimony was influenced by her probationary status. Defendant suggests the fact a witness is on probation at the time of trial is always relevant because it tends to show the witness's bias toward the prosecution "due to the witness' 'vulnerable status as a probationer.'" Assuming, *arguendo*, this is a correct statement of the law, Delgado's probationary status was only marginally relevant. Because there is no evidence her testimony may have been influenced as a result of her probationary status, counsel's decision not to impeach Delgado with the fact she was on probation was a reasonable tactical decision.

Delgado was neither a key witness for the prosecution, nor did her testimony resolve the conflicting version of events offered by Ortega and defendant. Delgado did not witness the physical altercation between defendant and Ortega, and as a result, the jury could draw no inferences as to whether defendant's attack on Ortega was intentional or accidental based on her testimony. To the extent Delgado's testimony was in some way damaging to defendant's claims, trial counsel thoroughly and effectively cross-examined Delgado at trial, emphasizing the fact Delgado had a faulty memory and could not recall significant details about the incident. Thus, even assuming trial counsel erred, defendant has failed to demonstrate prejudice.

## **II. Trial Counsel Did Not Render Ineffective Assistance of Counsel for Referring to Defendant's Prior Convictions as Commercial Burglaries**

Defendant further contends trial counsel was ineffective for referring to defendant's prior convictions for commercial burglary, rather than utilizing a sanitized description of the convictions as "theft-related felonies." The People assert counsel's inadvertent reference to the specific nature of defendant's prior convictions did not demonstrate deficient performance because sanitization was not required. Assuming trial counsel erred, they further contend defendant failed to show the error was prejudicial.



We agree with the People. Trial counsel's error did not rise to the level of deficient performance, nor was defendant prejudiced by the error.

#### **A. Background**

Prior to trial, the prosecutor moved to admit defendant's prior felony convictions against him if he chose to testify. The trial court tentatively ruled the prior convictions were admissible for purposes of impeachment. Defense counsel asked whether defendant's prior convictions for commercial burglary could be referred to as "theft-related offenses," rather than commercial burglaries. The prosecutor agreed.

On direct examination, trial counsel asked defendant if he had been convicted of commercial burglary in 2001 and 2003. Defendant admitted he had been. On cross-examination, the prosecutor clarified the prior convictions were felonies. Trial counsel later explained his reference to defendant's convictions for commercial burglary was inadvertent.

#### **B. Discussion**

Whether or not sanitization was required, the parties agreed defendant's prior convictions for commercial burglary would be referred to as theft-related offenses. Thus, we will assume trial counsel erred in inadvertently referring to defendant's prior convictions as commercial burglaries. Nonetheless, the error does not rise to the level of ineffective assistance of counsel, nor was it prejudicial.

In *People v. Malone* (1988) 47 Cal.3d 1, 19, the defendant's trial counsel asked him on the stand, "'Have you ever been convicted of *any* serious crimes of violence such as rape or mayhem or murder or anything like that?'" (Italics added.) Counsel intended to ask only whether the defendant had ever committed murder or rape. (*Ibid.*) The inadvertent question opened the door for the prosecutor to ask on cross-examination about a prior kidnapping the defendant committed. (*Ibid.*) Among other charges, the defendant was on trial in a capital case for kidnapping. (*Id.* at p. 12.) Although our Supreme Court ultimately concluded the defendant was not prejudiced by the error, the

court held “[s]uch a slip of the tongue does not, in our view, establish ineffective assistance of counsel.” (*Id.* at pp. 19-20.)

Here, as in *Malone*, trial counsel’s error does not rise to the level of ineffective assistance of counsel. While trial counsel erred, we conclude the error was inadvertent, and defendant has failed to show he was prejudiced as a result of the error. The fact the jury heard defendant was previously convicted of commercial burglary—a crime similar but not identical to the offense he was being tried for—does not compel a finding of prejudice. Even the admission of prior convictions which are identical to the charged offense are not per se prejudicial. (See *People v. Lewis* (1987) 191 Cal.App.3d 1288, 1297–1298 [trial court did not abuse its discretion in admitting defendant’s prior convictions for rape where defendant was on trial for rape].)

Significantly, the jury here heard only the fact defendant suffered prior convictions for commercial burglary in 2001 and 2003. Because these convictions were theft-related, rather than motivated by an intent to commit a battery or assault amounting to a felony, we are not persuaded the jury concluded because defendant committed the prior theft-related crimes he likely committed the charged burglary.

In *People v. Coleman* (1979) 89 Cal.App.3d 312, 319–320, the appellate court held the trial court did not abuse its discretion in permitting the defendant to be impeached with a recent prior conviction for burglary, even though the defendant was on trial for burglary. (*Id.* at p. 320.) The court reasoned “There is not a substantial likelihood that a jury would misuse the felony conviction evidence and conclude that because defendant committed a burglary with intent to commit theft at some point in the past, he therefore committed the burglary charged of an entry into the victim’s home with the intent to commit rape.” (*Ibid.*)

Here, defendant’s prior convictions were remote in time, involved burglaries motivated by a different intent than the intent underlying the charged burglary (felony assault and battery) and, further, only limited details were offered as to the prior

convictions. We are, therefore, not persuaded a verdict more favorable to defendant would have resulted absent trial counsel's inadvertent reference to defendant's prior convictions. (*Strickland, supra*, 466 U.S. at pp. 687, 694.)

### **III. Substantial Evidence Supports Defendant's Conviction for Battery Causing Serious Bodily Injury in Count 3**

Defendant contends there is insufficient evidence to support his conviction for battery causing serious bodily injury (§ 243, subd. (d)) because the injuries Ortega sustained to her nose were not substantial. We disagree. The plain language of section 243 states a serious bodily injury includes bone fracture—the exact injury Ortega suffered as a result of defendant's attack.

#### **A. Background**

At trial, Ortega testified defendant hit her in her face, leaving her nose crooked and bloody. After defendant punched her, Ortega was in pain and she could barely move. She continued to feel pressure, tightness, and dizziness the day after the incident. Ortega was taken to the hospital as a result of her injuries. Her medical records indicate her nasal bone was fractured, and at the time of defendant's trial, her nose was still crooked.

#### **B. Discussion**

The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1067.) In reviewing a record for substantial evidence, we may not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact. (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367.) Our sole function is to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Marshall* (1997) 15 Cal.4th 1, 34.) We reject evidence accepted by the trier of fact

only when it is inherently improbable and impossible of belief. (*People v. Maxwell* (1979) 94 Cal.App.3d 562, 577.)

Section 243, subdivision (f)(4) defines “serious bodily injury” as “a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; *bone fracture*; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.” (Italics added.) Although Ortega suffered a nasal bone fracture, an injury constituting a serious bodily injury within the meaning of section 243, defendant contends Ortega’s injuries did not amount to serious bodily injury. Relying on *People v. Nava* (1989) 207 Cal.App.3d 1490 (*Nava*), defendant asserts a broken bone does not necessarily constitute great bodily injury and, therefore, it does not amount to a serious bodily injury.<sup>2</sup> He specifically argues since Ortega’s injuries were comparatively less severe than the victim’s injuries in *Nava*, they could not constitute serious bodily injury.

Defendant misinterprets *Nava*. *Nava* held only that the trial court may not instruct the jury an injury satisfies section 12202.7 as a matter of law because such an instruction usurps the jury’s fact-finding role. (*Nava, supra*, 207 Cal.App.3d at pp. 1494-1498.) Section 12022.7 does not define great bodily injury. However, section 243, the statute at issue here, expressly states, “[A] ‘serious bodily injury’ means a serious impairment of physical condition, including but not limited to, loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.” (*Id.*, at subd. (f)(4).) *Nava* does not stand for the proposition that a bone fracture does not amount to a great or

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<sup>2</sup>Section 12022.7 is an enhancement for the personal infliction of great bodily injury during the commission or attempted commission of a felony. Because “great bodily injury” and “serious bodily injury” have substantially the same meaning (*People v. Hawkins* (1993) 15 Cal.App.4th 1373, 1375), section 12022.7 is relevant to our determination of whether Ortega suffered serious bodily injury.

serious bodily injury. Rather, the court held only that it was for the jury to make such a factual finding.

Defendant further contends *People v. Covino* (1980) 100 Cal.App.3d 660 (*Covino*) is instructive. In *Covino*, the defendant challenged the sufficiency of the evidence as to his conviction for an assault by means of force likely to produce great bodily injury. The defendant asserted an assault producing only momentary breathing difficulties and slight skin reddening without substantial damage to bodily tissues is not an assault by means of force likely to produce great bodily injury. (*Id.* at p. 667.) The appellate court held injury is not an element of the crime and clarified the issue was not whether serious injury was caused, but whether the force used would be likely to produce great bodily injury. (*Ibid.*) Although the trial court remarked that the victim did not appear to have suffered great bodily injury, whether the victim actually suffered great bodily injury was not relevant to the issue before the court. (*Ibid.*)

Defendant's reliance on *Nava* and *Covino* is misplaced. *Nava* concerned an instructional issue, whereas the issue in *Covino* was whether the force used by the defendant was likely to produce great bodily injury. We also observe, the victim in *Covino* suffered only transitory and moderate injuries, including momentary breathing difficulties and slight skin reddening. (*Covino, supra*, 100 Cal.App.3d at p. 667.) The record here contains ample evidence Ortega's injuries were significantly more serious.

Ortega's medical records showed she suffered a fracture of her nasal bone. Although, defendant contends there was no evidence Ortega had to have her fractured nasal bones reset, her nose was still disfigured at defendant's trial, over 10 months after the attack. Ortega also testified her nose was still crooked because she "had [not had] the surgery yet." In any event, "[t]here is no requirement ... the victim of the battery actually receive medical treatment." [Citation.] 'It is the nature, extent, and seriousness of the injury—not the inclination or disinclination of the victim to seek medical

treatment—which is determinative.’’ (*People v. Hayes* (2006) 142 Cal.App.4th 175, 181.)

Here, the jury determined Ortega’s injuries were substantial within the meaning of section 243, and there is ample evidence in the record to support the jury’s determination. We reject defendant’s claim.

#### **IV. Substantial Evidence Supports Defendant’s Burglary Conviction**

Defendant contends insufficient evidence supports his conviction for burglary. At trial, the prosecutor theorized defendant entered Ortega’s residence with the intent to commit the following felonies: corporal injury to a former cohabitant (count 2), or assault likely to cause great bodily injury (count 4). The jury convicted defendant of burglary, but convicted defendant of only the lesser included misdemeanor crimes on counts 2 and 4. On this basis, defendant asserts (1) there are no facts from which the jury could infer defendant entered Ortega’s residence with the intent to commit a felony; and, (2) his conviction for burglary must be reversed because the jury found him guilty of only misdemeanor offenses in counts 2 and 4, rather than felonies.

The People contend the jury’s acquittal of defendant on the target felonies does not necessitate reversal of defendant’s burglary conviction. We agree. Burglary requires only the intent to commit a felony, not the successful completion of a felony. From the record, there is substantial evidence defendant entered Ortega’s home with the intent to commit an assault or battery amounting to a felony.

#### **Discussion**

##### ***1. Substantial evidence supports the conclusion defendant entered Ortega’s residence with the intent to commit a felony.***

Defendant asserts the evidence to support his burglary conviction is insufficient because the jury found him guilty of only the lesser included misdemeanor offenses of battery on a former cohabitant and assault.

First degree burglary occurs when a person enters an inhabited dwelling “with intent to commit grand or petit larceny or any felony.” (§§ 459, 460.) As can be seen,

the plain language of the statute requires nothing more than the intent to commit a theft offense or a felony.

Here, substantial evidence supports the jury's finding defendant entered Ortega's home with the intent to commit a felony, notwithstanding the fact the jury found him guilty of only lesser included misdemeanors as to counts 2 and 4. Despite the fact defendant was no longer in a relationship with Ortega and he was not welcome at her home, he called her repeatedly. Ortega testified defendant was extremely jealous of other men around her. When defendant discovered Moreno at Ortega's home, he picked up a knife and told Ortega, "[he was] going to go after [Moreno]." Defendant then hit and slapped Ortega, exited the home, and ran back inside a second time to attack her. The record demonstrates defendant was exceedingly jealous and obsessive, and the jury could reasonably infer, without speculating, that defendant intended to resort to extreme violence when he discovered Ortega with a male companion.

"When the evidence justifies a reasonable inference of felonious intent, the verdict may not be disturbed on appeal." (*People v. Matson* (1974) 13 Cal.3d 35, 41.) Here, the jury reasonably concluded defendant entered Ortega's home with the intent to commit a felony as charged in count 2 or count 4, even though the jury convicted defendant of only misdemeanor offenses pursuant to these counts.

**2.     *The fact defendant was not convicted of a target felony does not necessitate dismissal of the burglary conviction.***

Defendant also asserts the jury's acquittal of him on the target felonies (counts 2 and 4) necessitates reversal of his burglary conviction. Defendant acknowledges that while inconsistent verdicts are routinely permitted to stand, this case falls under a narrow exception to the well-settled rule.

We reject defendant's argument for one simple reason—burglary requires only the intent to commit a felony at the time of entry, it is irrelevant whether the intended offense is actually accomplished. (*People v. Novo* (1936) 12 Cal.App.2d 525, 528 [if a defendant enters a home with the intent to commit a felony, defendant is guilty of burglary even if

he or she abandons that unlawful purpose one moment after entry and in spite of his or her failure to accomplish the target offense].) Thus, the jury's guilty verdict on the burglary charge, but acquittal of defendant's felony conduct on counts 2 and 4, are not inconsistent. Only the intent to commit a felony is required for purposes of burglary and, as discussed, there was ample evidence to conclude defendant entered Ortega's home with the intent to commit a felony.<sup>3</sup>

**V. The Trial Court Did Not Err in Failing to Define “Felony” Sua Sponte, or in Failing to Explain the Effect of Finding Defendant Guilty of a Lesser Included Offense on Count 2 or 4**

In his final claim on appeal, defendant asserts the trial court had a sua sponte duty to define the term “felony” when instructing the jury as to burglary, and had a duty to explain that if the jury believed defendant only intended to commit a misdemeanor when he unlawfully entered Ortega's home, it must find him not guilty of burglary. Defendant asserts the jury may have convicted him of burglary based on the mistaken belief the intent to commit a misdemeanor at the time of an unlawful entry into an occupied dwelling would constitute burglary. We conclude the trial court was not obligated to instruct the jury in the manner defendant suggests, and because defendant did not request a clarifying instruction on this point, the trial court did not err.

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<sup>3</sup>Many of defendant's arguments on appeal challenging his conviction for burglary are based upon the same flawed foundation. Because the jury acquitted him of the felony assault and battery charges on counts 2 and 4, he concludes the jury must have mistakenly convicted him of burglary. This is a faulty conclusion for two reasons. First, as noted, burglary requires only the intent to commit a felony and not the successful completion of the felony. Thus, defendant's conviction for burglary, but acquittal on the target felonies, is not inconsistent.

Second, defendant ignores the fact the jury found him guilty of felony battery in count 3, and found defendant inflicted great bodily injury in the commission of the battery, as well as the burglary. To the extent the jury rendered inconsistent verdicts in acquitting defendant of some felony assault and battery offenses, but convicting him of others and of inflicting great bodily injury, no conclusions can be drawn. Inconsistent verdicts may be attributed to ““mistake, compromise, or lenity.”” (*People v. Guerra* (2009) 176 Cal.App.4th 933, 943.) While defendant's arguments invite us to conclude his burglary conviction was the result of mistake, it is just as likely the jury acquitted defendant of the felony offenses alleged in counts 2 and 4 by compromise or lenity.



## **A. Background**

In closing argument, the prosecutor instructed the jury that burglary requires “entering into a dwelling with the intent to commit the two crimes that were delineated by the Judge. One of them being Count Two, and the other one being Count Four.” The prosecutor further explained to convict defendant of count 2, the jury did not have to find defendant intended to injure Ortega. However, to conclude defendant committed burglary, the jury was required to find defendant not only intended to injure her, he harbored this specific intent at the time he entered Ortega’s home.

With respect to count 4, the prosecutor explained the difference between this count and count 2 was “that in PC 245 in Count Four, the force has to be likely to produce great bodily injury. ... And the fact that [great bodily injury] did [occur] in this case [was] more evidence that it was likely to occur.” Thus, the jury was instructed count 2 required traumatic injury, count 4 required a finding of force used likely to produce great bodily injury, and count 1 required the People to prove defendant intended to commit one of those two crimes when he entered Ortega’s home.

Prior to deliberations, the jury was also instructed pursuant to CALCRIM No. 1700, which provides the following, in relevant part:

“A burglary was committed if the defendant entered with the intent to inflict an injury on his former cohabitant that resulted in a traumatic condition or to commit assault with force likely to produce great bodily injury. The defendant does not need to have actually inflicted an injury on his former cohabitant that resulted in a traumatic condition or committed assault with force likely to produce great bodily injury as long as he entered with the intent to do so. The People do not have to prove that the defendant actually inflicted an injury on his former cohabitant that resulted in a traumatic condition or committed assault with force likely to produce great bodily injury.

“The People allege that the defendant intended to inflict an injury on his former cohabitant that resulted in a traumatic condition or to commit assault with force likely to produce great bodily injury. You may not find the defendant guilty of burglary unless you all agree that he intended to commit one of those crimes at the time of the entry. You do not all have to agree on which one of those crimes he intended.”

## B. Discussion

Defendant contends the trial court committed reversible error in failing to define the term “felony” for the jury for purposes of determining whether defendant entered Ortega’s home with the intent to commit a felony. He asserts *People v. Failla* (1966) 64 Cal.2d 560, 564 (*Failla*) is illustrative on this point.

In *Failla*, the defendant was charged with five separate burglaries. (*Failla, supra*, 64 Cal.2d at p. 563.) The trial court instructed the jury as follows: “one who enters an apartment with intent to commit theft ‘or any felony’ is guilty of burglary.” (*Id.* at pp. 563-564.) Similarly, a second instruction stated “a necessary element of burglary is a specific intent to commit theft ‘or any felony.’” (*Ibid.*) The jury was not instructed as to what crime or crimes the defendant intended to commit when he unlawfully entered the victims’ homes. On the evidence presented, the defendant’s intent was ambiguous because the jury could reasonably infer “not only that defendant intended to commit one or more felonies (e.g., oral copulation or felonious assault), but also intended to commit one or more misdemeanors (e.g., indecent exposure or battery) or acts which are not crimes (e.g., masturbation).” (*Failla, supra*, at p. 565.)

The court found reversible error, explaining:

“[W]here the evidence permits an inference that the defendant at the time of entry intended to commit one or more felonies and also an inference that his intent was merely to commit one or more misdemeanors or acts not punishable as crimes, the court must define ‘felony’ and must instruct the jury which acts, among those which the jury could infer the defendant intended to commit, amount to felonies. Failure to do so is error, for it allows the triers of fact to indulge in unguided speculation as to what kinds of criminal conduct are serious enough to warrant punishment as felonies and incorporation into the burglary statute.” (*Failla, supra*, 64 Cal.2d at p. 564.)

In *People v. Rathert* (2000) 24 Cal.4th 200, 204, our Supreme Court reaffirmed the holding of *Failla*, stating: “In a burglary prosecution, complete and accurate jury instructions include the definition of each felony the defendant is alleged to have intended to commit upon entry into the burglarized structure.” Failure to so instruct

constitutes reversible error. (*Failla, supra*, 64 Cal.2d at p. 564; *People v. Smith* (1978) 78 Cal.App.3d 698, 709-710; *People v. Allison* (1966) 245 Cal.App.2d 568, 575-577.)

No such reversible error occurred here. Unlike in *Failla*, the trial court here did not define the term “felony” because the burglary instruction did not contain ambiguous language referring to “any other felony.” The jury was specifically instructed that to find defendant guilty of burglary, it must find defendant had the specific intent to either (1) inflict injury on a former cohabitant resulting in a traumatic condition, or (2) to commit assault with force likely to produce great bodily injury. These were the only two crimes used to support the prosecutor’s theory of criminal liability as to the burglary charge against defendant.

The trial court not only instructed the jury on the specific felonies underlying the prosecution’s theory of burglary, the jury was instructed on the elements of both felonies, and the lesser included offenses of each crime. The prosecutor also made clear in closing argument that if the jury did not believe defendant intended to commit one of those two crimes when he entered Ortega’s home, it must vote not guilty. As a result, the jury was not left “to indulge in unguided speculation” as to defendant’s intent when he entered Ortega’s home, or whether defendant’s intended crimes were serious enough to find him guilty of burglary. (*Failla, supra*, 64 Cal.2d at p. 564.) The jury was sufficiently instructed as to what intent was required to find defendant guilty of burglary.

Jurors are presumed to be intelligent persons ““capable of understanding and correlating all jury instructions which are given.”” (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) In the absence of any evidence to support defendant’s conclusion the jury convicted him of burglary based on the mistaken assumption the intent to commit conduct amounting to only a misdemeanor (rather than a felony) was sufficient, we presume the jury followed the trial court’s clear and explicit instructions.

Defendant did not object to or seek modification of any of the instructions he now challenges. “A party may not complain on appeal that an instruction correct in law and

responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.” (*People v. Lang* (1989) 49 Cal.3d 991, 1024, abrogated on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.) Because counsel failed to request a clarifying or amplifying instruction and the trial court had no duty to instruct the jury sua sponte in the manner defendant suggests, we find no error. We conclude the trial court’s instructions as to the burglary charge were sufficient as given.

### **DISPOSITION**

The judgment is affirmed.

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MCCABE, J.\*

WE CONCUR:

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POOCHIGIAN, Acting P.J.

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PEÑA, J.

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\*Judge of the Merced Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.